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Supreme Court of the United States

OCTOBER TERM, 1955.

No. 778

LEO POTISHMAN, JULIAN SCOTT, TRANSIT GRAIN COMPANY and CHARLES J. WINTERS,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES.

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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Leo Potishman, Julian Scott, Transit Grain Company and Charles J. Winters, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on February 23, 1956, in Cause No. 15533, styled *United States of America, appellant, vs. Leo Potishman, Julian Scott, Transit Grain Company and Charles J. Winters, appellees.*

OPINIONS BELOW.

The majority opinion of Judge Rives and Judge Tuttle, and the dissenting opinion of Judge Cameron, Court of

Appeals for the Fifth Circuit, are not reported but are copied in the appendix (App. 19). The opinion of the United States District Court for the Northern District of Texas, Dallas Division, handed down February 24, 1955, is not reported but is copied in the appendix (App. 38).

JURISDICTION.

The judgment and decree of the United States Court of Appeals were dated and entered on February 23, 1956 (Tr. 215).

Motion for rehearing in the United States Court of Appeals was not filed.

Jurisdiction of this court is invoked under the provisions of Section 1254(1), 62 Stat. 928, 28 United States Code (1946 Edition, Supplement III), Section 1254(1), the prosecution being under an indictment charging violation of the penal statutes of the United States.

THE QUESTION PRESENTED FOR REVIEW.

Where there has been an agreement between the representatives of the United States and the defendants to dispose of a prosecution under an indictment charging conspiracy and certain substantive offenses by accepting pleas of guilty on certain counts and dismissing the remaining counts, and the trial court consents to such a

disposition; and, after a hearing in which a complete statement was made of the facts upon which the indictment was based, including facts on which a later indictment (the one here involved) was based, the court imposed fines and sentences (suspended), it being intended that no further punishment would be imposed or prosecution had,—may the Government repudiate its agreement and the dismissal by bringing another indictment based on facts involved in the dismissed counts and in instances charging the same offenses as those charged in the dismissed counts?

STATUTES INVOLVED.

The statutes involved are:

1. Section 371, Title 18, United States Code (1946 Edition, Supplement III) 599; Section 371, 62 Stat. 701 (Appendix 16).

2. Section 1341, Title 18, United States Code (1946 Edition, Supplement III) 667, Section 1341, 62 Stat. 763, amended Section 34, 63 Stat. 94 (Appendix 16).

3. Section 714m(a), Title 15, United States Code (1946 Edition, Supplement III), 475, Section 15(a), 62 Stat. 1074 (Appendix 17).

4. Section 714m(c), Title 15, United States Code (1946 Edition, Supplement III) 476, Section 15(c), 62 Stat. 1074 (Appendix 17).

5. Section 714m(e), Title 15, United States Code (1946 Edition, Supplement III) 476, Section 15(e), 62 Stat. 1074 (Appendix 18).

STATEMENT OF THE CASE.

In October 1953, an indictment was returned in the United States District Court for the Southern District of Texas, Houston Division, charging that Leo Potishman, Julian Scott, Transit Grain Company and William Fellrath conspired to defraud the United States, in violation of Section 371, Title 18, and Section 714m(e), Title 15, United States Code, to make false statements to the Commodity Credit Corporation in violation of Section 714m(a), Title 15, United States Code, and to having devised a scheme to defraud the United States and Commodity Credit Corporation, and to use the mail for the purpose of executing and carrying out such unlawful scheme in violation of Section 1341, Title 18, United States Code (Tr. 3-4). Various overt acts were alleged (Tr. 7-13). In addition to the conspiracy count there were nine counts alleging substantive offenses. These charged that defendants made false statements to the Commodity Credit Corporation in violation of Section 714m(a), Title 15, United States Code, and devised schemes to defraud Commodity Credit Corporation in violation of Section 1341, Title 18, United States Code (Tr. 13-25).

Defendants were arraigned on October 8, 1953; each of them entered a plea of not guilty to each of the counts in the indictment, and the case was passed to January 4, 1954 (Tr. 189-190).

" 'Later and before proceeding further, a conference was held between defendants' counsel and Government counsel, after which the attorneys appeared in court' " * * * (Tr. 101, 204). On October 30, 1953, Leo Potishman, Julian Scott and William Fellrath were rearraigned and entered pleas of guilty to counts five and six; and the case was passed for sentencing until November 11, 1953 (Tr. 64-65, 189-190). On November 11, 1953, an extended hearing was held, at the conclusion of which a fine of $10,000 was assessed against Leo Potishman on each of the two counts to which he had entered a plea of guilty, and in addition he was sentenced to imprisonment for a period of three years on each of the two counts, the sentences to run concurrently but suspended for a term of five years (Tr. 120-170, 190). Like punishments were asked and imposed upon defendant Julian Scott and upon defendant William Fellrath (Tr. 66-67, 165-166, 190-191).

The remaining counts of the indictment returned in the United States District Court for the Southern District of Texas, Houston Division, were dismissed on motion of the United States attorney (Tr. 65).

Petitioners urge that it was the agreement and the intent of the representatives of the United States in the proceedings at Houston and the intent of petitioners to end all prosecutions based upon any federal law violations arising out of the handling and sale by petitioners of 1,000,000 bushels of wheat, purchased by Transit Grain Company and stored in elevators at Houston, Texas, and New Orleans, Louisiana; and that the pleas, the punishments there imposed and the dismissals there entered were

intended to bar any further prosecutions based upon the purchase, handling and disposing of the 1,000,000 bushels of wheat.

In disregard of what petitioners believe were the bona fides of the actions taken by Government counsel and the court at Houston, an indictment was thereafter returned at New Orleans, involving the handling in like manner of some of the same 1,000,000 bushels of wheat. The indictment charged these petitioners with conspiracy and certain substantive offenses in connection with the wheat stored in the elevator at New Orleans (Tr. 26-44). The offenses charged were not unlike those charged in other indictments. After arguments on motions in the District Court, the New Orleans indictment was dismissed on November 17, 1954 (Tr. 73-74).

Later another indictment, the third against these defendants and significantly similar to the other two, was returned in the District Court of the United States for the Northern District of Texas, Dallas Division (Tr. 44-64, 3rd par. Tr. 92). The Dallas indictment was dismissed by the District Court, after argument, and this appeal followed.

In a number of instances the offenses charged in the indictment returned in the Houston Division were charged in the indictment returned in the Dallas Division.

In sub-paragraph (b) of the first count of the Houston indictment (Tr. 4) it was charged that defendants Potishman, Scott, Transit Grain Company and Fellrath, conspired to make, in violation of Section 714m(a), Title 15,

United States Code, material false statements to Commodity Credit Corporation for the purpose of influencing the action of the corporation and for the purpose of obtaining money from it. The first count of the Dallas indictment (Tr. 44-58) charges conspiracy to violate Section 714m(a), Title 15, United States Code, by making false statements for the purpose of influencing the action of Commodity Credit Corporation and for the purpose of obtaining money from it. It is apparent that in the first count of the Houston indictment and in the first count of the Dallas indictment a conspiracy was alleged to violate the same statute; the dates are substantially the same, and the testimony that would sustain one would sustain the other.

In the first count of the Houston indictment and in the first count of the Dallas indictment overt acts are alleged, and at least in one instance the identical act is alleged in both indictments. The overt act alleged (Tr. 8) in paragraph (5) of the list of overt acts charged in the first count of the Houston indictment is identical with the overt act alleged (Tr. 53) in paragraph (12) of the list of overt acts charged in the first count of the Dallas indictment. There are at least three other instances in which overt acts alleged in the first count of the Houston indictment relate to or are a part of the overt acts alleged in the first count of the Dallas indictment or could be sustained by the same testimony, but the one instance pointed out in the last preceding sentence of this paragraph is sufficient to show that the conspiracy count in the Houston indictment and the conspiracy count in the Dallas indictment charge the same offense, it being remembered that in both indict-

ments the Government charges a conspiracy to violate Section 714m(a), Title 15, United States Code.

Proof of the allegations of the first count of the Houston indictment would be sufficient to establish the offense alleged in the first count of the Dallas indictment.

In paragraph (8) of the overt acts in the Houston indictment (Tr. 8) it is alleged that on or about April 20, 1951, Transit purchased 100,000 bushels of damaged Canadian wheat from the Kellogg Milling Company. In paragraph (14) of the overt acts alleged in the Dallas indictment (Tr. 53) the charge is that on or about July 12, 1951, Transit purchased from Kellogg Milling Company 100,000 bushels of damaged Canadian wheat. The dates of the alleged purchases are not the same but testimony which would support the allegation set forth in overt act (8) of the Houston indictment would also support the allegation set forth in overt act (14) of the Dallas indictment.

The second count of the Houston indictment (Tr. 13-14) alleges a false statement knowingly made to Commodity Credit Corporation for the purpose of obtaining money in violation of Section 714m(a), Title 15, United States Code. The second, third and fourth counts of the Dallas indictment (Tr. 58-64) allege fraudulent acts in violation of Section 714m(a), Title 15, United States Code. The second, third, fourth, fifth and sixth counts of the Houston indictment (Tr. 12-23) allege fraudulent acts for the purpose of injuring Commodity Credit Corporation in violation of Section 714m(a), Title 15, United States Code .

In the second, third, fourth (Tr. 12-16) and seventh (Tr. 19-22) counts of the Houston indictment the offenses alleged are of the same type as those alleged in the second, third and fourth counts of the Dallas indictment (Tr. 58-64), but the teletypes or statements alleged are different.

In so far as the fifth and sixth counts (Tr. 17-19) of the Houston indictment are concerned, defendants Potishman, Scott and Transit entered pleas of guilty. These are counts based upon alleged false representation to the Commodity Credit Corporation by statements made on a form identified as Commodity Credit Corporation Form 228.

On the prosecution so brought at Dallas, the District Judge was of the opinion that prosecution was not justified and dismissed the indictment (Tr. 90, App. 38). The order was dated February 24, 1955 and entered March 22, 1955 (Tr. 103).

REASONS AND ARGUMENT FOR ALLOWING THE WRIT.

1. The decision of the majority of the Court of Appeals should be reviewed by this court because the majority of the Court of Appeals has decided an important question of federal law which has not been (in so far as petitioners' attorneys are able to determine), but should be, settled by this court.

2. It appears that the holding of the Court of Appeals for the Fifth Circuit in this case and in *Buie v. United States*, 76 F(2) 849 (1935), may conflict with holdings of the Court of Appeals for the Fourth Circuit in *Short vs. United States*, 91 Fed. (2d) 614, 620-622 (1937), in respect to the identity of offenses.

3. It is apparent from the record that petitioners agreed to enter pleas of guilty to counts five and six in the Houston indictment, and that in turn the Government agreed to dismiss the remaining counts, and that District Judge Hannay sanctioned the agreements. It is also apparent from the record of the hearing before Judge Hannay (Tr. 120-170) that it was the purpose of the United States attorney (see his statement Tr. 164) and of defendants to bring to an end all criminal prosecutions based upon the purchase, storage, blending, sale and disposition of the 1,000,000 bushels of wheat purchased, stored and sold by Transit Grain Company. It is also apparent that District Judge Hannay recognized such to be the purpose of defendants and of Government counsel; and, to be convinced that the disposition of the prosecution was proper and that the punishment imposed was commensurate with the wrongs that had been done, Judge Hannay held a hearing in which the facts bearing upon defendants' activities in purchasing, storing, blending and selling Canadian wheat were fully explored. After the hearing had been completed, the District Judge imposed fines and sentences. (Tr. 120-170.)

4. The hearing at Houston covered the quantity of wheat purchased, the storing of part of it in the Houston

elevator and part in the New Orleans elevator, the practices in upgrading wheat by blending, and the sale of wheat to Commodity Credit Corporation. The hearing was not confined to the two counts on which pleas were entered. The hearing went far beyond those counts, and in general brought before the court the important facts in petitioners' dealings in the 1,000,000 bushels of wheat (Tr. 120-170).

5. In the dissenting opinion (Tr. 202, App. 25) Circuit Judge Cameron concurred in the findings of United States District Judge Davidson of the trial court and agreed with the order dismissing the indictment returned at Dallas. The following, summarized from Judge Cameron's dissenting opinion, seem to amply support the dismissal of the Dallas indictment (a) the essence of the Houston indictment "was formed of precisely the same facts and cause of action" as those involved in the Dallas indictment with minor variations with respect to overt acts; and "each of the three efforts at prosecutions (at Houston, New Orleans and Dallas) had as its base the same alleged criminal course of action over the same period of time" (Tr. 203, App. 26); (b) the trial court found that the Houston indictment was disposed of under circumstances making it clear that the punishment there imposed was intended to cover the entire offense embraced in all of the counts of that indictment and that all parties and the trial court intended there should be no further punishment for the activities embraced in the indictment, and Judge Cameron found this to be true "as a matter of fact" and added that the record in the Houston case "will show that the true facts support the findings of the Court below" (Tr.

204); (c) the transcript of the hearing before Judge Hannay at Houston shows that the two counts on which the pleas were entered "were mentioned only casually a time or two, while all of the attorneys talked in detail of the 1,000,000 bushels described in the conspiracy count and constituting the sum total of all of the wrongdoing embraced in all of the counts" (Tr. 206); (d) concerning the quoted part of the statement made by the assistant United States attorney to Judge Hannay (Tr. 206), Judge Cameron said that every word of the statement referred to the conspiracy count "giving the over-all picture of the activities charged against appellees and no part of it referred to the items covered by counts five and six (Tr. 207, App. 29); (e) the findings made and the statement of counsel upon which they were based were said by Judge Cameron to "reflect beyond doubt that the sentences imposed by the Houston court were predicated upon the offense charged by that indictment as a whole and not upon the relatively insignificant offenses covered by the fifth and sixth counts" (Tr. 209, App. 32); (f) "It is not possible to read the statements of court and counsel upon which Judge Hannay acted in entering the Houston judgment without perceiving clearly that the Judge was weighing, with the help of all counsel, the gravity and extent of the entire accusations contained in the Houston indictment; and that the punishment inflicted represented the Court's judgment as to what was proper based upon the whole course of dealings" (Tr. 210, App. 33).

6. Defendants in criminal cases and their attorneys should be able to rely on the good faith of the Government in such a proceeding as was conducted before Judge

Hannay in disposing of the case there pending; but if the Government, having entered into such an arrangement, may later repudiate its agreement, confidence in the courts will be shaken and the multitude of cases which otherwise would be disposed of on such agreements will stand on the dockets for trial.

7. It is apparent that the conspiracy count in this case could have been brought in Houston as readily as in Dallas, since, as has been pointed out above, at least one of the overt acts alleged in the Dallas indictment was also alleged in the Houston indictment (Tr. 8, 53), and the trial judge could have protected his order.

8. Government prosecutors who may be dissatisfied with the punishment imposed in a criminal case should not, where the case has been disposed of as were the charges under the Houston indictment, be permitted to overrule, in effect, the action of the first court by bringing in the court of another division and district a prosecution on a phase or some count that was considered disposed of in the first case. It must be that the courts will at all times protect the spirit as well as the letter of its rulings, judgments and decrees. As stated by Judge Cameron "what it (the District Court) was attempting was to make the Government do right, just as individuals must do." (Tr. 214, and Footnote 9, Tr. 214, App. 37.)

9. It is improper to divide a general conspiracy into two or more conspiracies for the purpose of bringing multiple charges or counts in an effort to increase penalties or to harass defendants with a multiplicity of charges

or for any other purpose. (*Blumenthal vs. United States*, 332 U. S. 539, 559 (1947), *Sealfon vs. United States*, 332 U. S. 575, 578 (1948); *Braverman vs. United States*, 317 U. S. 49, 53-55 (1942); *Short vs. United States*, 91 Fed. (2d) 614, 620-623 (1937).)

10. The court should ever have the power to accept a plea of guilty on certain counts under an agreement of an authorized representative of the Government to dismiss other counts. To repudiate such an arrangement is unjust. Collateral estoppel and res judicata should be applied in criminal cases to prevent an injustice when there may be some technical reason making a plea of former jeopardy unavailable to the accused. (*Sealfon vs. United States*, 332 U. S. 575, 578 (1947); *United States vs. Adams*, 281 U. S. 202, 204-205 (1930).)

11. These defendants are not habitual criminals, and on the contrary, they are respected substantial business men and first offenders as appears from the record (Tr. 146-157). Even the assistant United States attorney recognized that and spoke for clemency for them (Tr. 164). It would be unjust and, as petitioners see it, a violation of the good faith of a court proceeding to subject defendants to prosecution in a second case after such defendants had been punished in a prior prosecution involving substantially the same conduct.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Section 1341, Title 18, United States Code (1946, Supplement III) 599, Section 371, 62 Stat. 701:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.."

Section 1341, Title 18, United States Code (1946, Supplement III) 667, Section 1341, 62 Stat. 763, amended Section 34, 63 Stat. 94:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by

the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Section 714m(a), Title 15, United States Code (1946, Supplement III) 475, Section 15(a), 62 Stat. 1074:

"Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

Section 714m(c), Title 15, United States Code (1946, Supplement III) 476, Section 15(c), 62 Stat. 1074:

"Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

Section 714m(e), Title 15, United States Code (1946, Supplement III) 476, Section 15(e), 62 Stat. 1074:

> "All the general penal statutes relating to crimes and offenses against the United States shall apply with respect to the Corporation, its property, money, contracts and agreements, employees, and operations: *Provided,* That such general penal statutes shall not apply to the extent that they relate to crimes and offenses punishable under subsections (a), (b), (c), and (d) of this section: *Provided further,* That sections 431 and 432 of Title 18 shall not apply to contracts or agreements of a kind which the Corporation may enter into with farmers participating in a program of the Corporation."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15533

UNITED STATES OF AMERICA,
Appellant,

versus

LEO POTISHMAN, JULIAN SCOTT, TRANSIT GRAIN COMPANY and CHARLES J. WINTERS,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(February 23, 1956.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: The district court dismissed an indictment against the appellees and the Government appeals. Count 1 of the indictment charged a conspiracy under the provisions of §714m(d), Title 15, U.S.C.A.,[1] to violate the provisions of §714m(a),[2] Title

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[1] "(d) Whoever conspires with another to accomplish any of the acts made unlawful by the preceding provisions of this section shall, upon conviction thereof, be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for doing such unlawful acts."

[2] "(a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under sections 714-714o of this title, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both."

15, U.S.C.A., and §714m(c),[3] Title 15, U.S.C.A. The remaining three counts are substantive counts charging violations of §714m(a), Title 16 U.S.C.A.

The dismissal was predicated largely upon former jeopardy, estoppel, or res judicata, on account of previous criminal proceedings had in the federal courts at Houston against some of the defendants and at New Orleans against all of them.

Winters was not named in the Houston indictment. Potishman, Scott, Transit Grain Company, and a man named Fellrath were indicted at Houston on a ten-count indictment, one count charging conspiracy and nine substantive counts. Upon arraignment each of the defendants pleaded not guilty. At a later date, the defendants were rearraigned, Transit again pleaded not guilty to all counts, and the individual defendants pleaded guilty to Counts 5 and 6 and not guilty to the remaining counts. On that day the Government moved to dismiss the remaining counts as to the individual defendants and all of the counts as to Transit. On the same day, the court accepted the pleas of guilty, dismissed the counts as requested by the Government,[4] directed

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[3] "(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both."

[4] The judgment reads:

"On this 30th day of October, 1953, came the attorney for the United States of America and the defendant, Leo Potishman, appeared in person and with counsel, and both parties announcing ready, the said defendant, having been served with a copy of the Indictment, was rearraigned; where-

the probation officer to make a pre-sentence investigation, and postponed sentencing until a later day, at which time the individual defendants appeared, and, after a pre-sentence hearing, were sentenced.

There is no basis on which the Houston indictment could support a defense of former jeopardy as to Winters or as to Transit for Winters was not named in the Houston indictment, and the Government dismissed all counts as to Transit. The record does not show that the court ever entered upon trial of any of the defendants under the Houston indictment, except upon Counts 5 and 6 to which the individual defendants pleaded guilty. Those two substantive Houston counts charged false statements with respect to grain at the Houston elevator, and clearly do not involve the same offenses as the three substantive counts of the instant indictment

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upon the defendant entered a plea of guilty to Counts 5 and 6. Counts 1, 2, 3, 4, 7, 8, 9 and 10 were dismissed on motion of the United States Attorney.

"And the Court, having heard the plea of the defendant and all questions of fact as well as of law, finds the defendant guilty as charged in Cts. 5 and 6.

"It is considered by the Court that the defendant be, and he is hereby adjudged guilty of unlawfully making, etc., material false statements, Vio. Sec. 714m(a), Title 15, U.S. Code, as charged in Counts 5 and 6 of the Indictment.

"The probation officer is directed to make a presentence investigation, and this case is passed for sentence until November 11, 1953, at 9:30 A.M.

"/s/ Allen B. Hannay.
JUDGE."

The docket entry was as follows:

"OCT 30, 1953: DEFTS. LEO POTISHMAN, JULIAN SCOTT and WILLIAM FELLRATH rearraigned—Enter plea of GUILTY to Cts. 5 and 6. Govt. moved to dismiss Cts. 1, 2, 3, 4, 7, 8, 9 and 10 as to all three defendants—accepted by Court.

"Govt. motion to dismiss Cts. 1, 2, 3, 4, 5, 6, 7, 8, 9 & 10 against deft. TRANSIT GRAIN CO.—accepted by Court."

which charge different false statements made on different days as to different grain in the New Orleans elevator. Manifestly then, jeopardy did not attach at Houston as to the matters charged in the present indictment.

The defendants Potishman, Scott and Transit urged that the Government was estopped by an alleged agreement made between them and the Government attorneys at Houston, that the pleas of guilty of the individual defendants at Houston would completely and finally dispose of all matters charged in the entire indictment. No proof of such an agreement was attempted, nor did the district court require any such proof. Instead, the judge, after stating at length his familiarity with the general practice of accepting pleas of guilty on some counts and dismissing the others as a complete and final disposition of all matters contained in the indictment, in effect, placed upon the Government the burden of proving affirmatively an agreement to leave the defendants open to later prosecution on the matters charged in the dismissed counts.[5]

In *Buie v. United States*, 5th Cir., 76 F. 2d. 848, 849, Judge Foster speaking for this Court said:

> "* * * On this conflicting evidence it was for the District Judge to say whether the agreement was

[5] "* * * the government is bound by what took place, unless there was an agreement, that it can be shown that there was agreement between the District Attorney and defendants' counsel to accept the plea of guilty on certain counts and leave the others open to formal prosecution or jurisdiction. Unless there is proof offered that there was such an arrangement made, we think the plea of former jeopardy must be sustained. There is no requirement of proof in our practice, but there must be proof of an exception to it.

* * * * *

"If there is no evidence from the former counsel, or the Judge, that this was an exception to the general practice, we think that the plea of former jeopardy must follow * * *."

proven. But we deem that immaterial. It is elementary that an indictment may be dismissed and the defendant reindicted for the same offense, if he had not been put in jeopardy. Appellant cites a number of cases to the effect that the United States is bound by an agreement entered into by her counsel in a civil case; other cases holding that where revenue claims have been compromised and paid criminal prosecutions are barred, and other cases holding that where witnesses have been compelled to give testimony against themselves before an investigating authority immunity results. It would be useless to review these cases, as none of them are in point, and we are not aware of any decision, either controlling of persuasive, that would support the contention of appellant. We have no hesitancy in holding that the government was not estopped to prosecute appellant in this case regardless of whether an agreement was made as alleged."

See also, *District of Columbia v. Buckley*, D.C.Cir., 128 F. 2d. 17, 20; 22 C.J.S., Criminal Law, §257.

Certainly, in the present state of the record, it cannot be held that the Government is estopped by anything that occurred in the Houston proceedings.

The conspiracy count of the indictment brought at New Orleans was dismissed by the court on the ground that it was duplicitous.[6] Thereafter the Government, with

[6] "The Court will deny the motion to dismiss the indictment as to all of the defendants, with exception of Count 1, which it dismisses on the ground that it is duplicitous."

leave of the court, entered a nolle prosequi of the entire indictment.[7] The judgment on motion to dismiss appears only in, and must be considered as limited by, the judge's memorandum (footnote 6, *supra*).[8] The ruling was not on the merits but on a formal or technical defect of pleading and the judgment is no bar to a second action.[9]

The conspiracy count in the New Orleans indictment charged the defendants with conspiracy "to defraud the Commodity Credit Corporation and the United States of America, and to violate Title 15, United States Code, Section 714m(a) and 714m(c)." It thus charged both a conspiracy under the general conspiracy statute, §371, Title 18, United States Code,[10] and a conspiracy under §714m(d), Title 15, United States Code (footnote 1, *supra*). The conspiracy count in the present indictment omitted any charge of conspiracy to defraud the Commodity Credit Corporation or the United States under §371, Title 18, United States Code, and confined the conspiracy charged to one under §714m(d), Title 15, United States Code, thus curing any duplicity that in-

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[7] "Now comes the United States of America, through the undersigned, and suggesting that leave of the Court to file a dismissal of the indictment herein is desired, does now enter, subject to the granting of such leave, a Nolle Prosequi in this cause.

"/s/ Prim B. Smith, Jr.
"ASSISTANT UNITED STATES ATTORNEY

"GRANTED: at New Orleans, Louisiana, this 17th day of November, A.D. 1954.

"/s/ J. Skelly Wright
"JUDGE"

[8] Aetna Life Ins. Co. v. Eaton, 2nd Cir., 43 F. 2d. 711, 715.

[9] Gould v. Evansville, etc. R.R. Co., 91 U.S. 526, 534; St. Louis, Southwestern Ry. Co. v. Bolinger, 5th Cir., 17 F. 2d. 924, 925; Passailaigue v. Herron, 5th Cir., 38 F. 2d 775, 776; 50 C.J.S., Judgments, §643, pp. 77, 78.

[10] See 15 U.S.C.A. 714m(e), providing that general penal statutes apply with certain exceptions.

hered in the New Orleans indictment.

The other grounds of the motion to dismiss were not relied on by the district court and are not argued in the appellees' brief. They appear to us so clearly without merit that we forego further discussion.

The judgment is

REVERSED.

CAMERON, Circuit Judge: I dissent.

CAMERON, Circuit Judge, DISSENTING:

The Court below found that appellees had indubitably been punished in a former prosecution for the entire crime charged in the indictment now before us and that it would not be legal or right to punish them again for the same crime. This finding was based upon the judgment entered in the former proceeding, and the evidence on which it rested (consisting of statements made by counsel and others in open court), together with the universal custom, known to the Court below, prevailing where that judgment had been entered and other relevant factors, also known to the Court below. The majority opinion reverses that judgment on the ground that there is not sufficient in the record to sustain those findings. Because I think that the majority's action tends to weaken the faith and trust mutually placed in each other by the Court and its officers, the attorneys, so vital to the performance of the judicial function, I am constrained to set out the grounds of my dissent.

The essence of the present indictment (known as Dallas indictment) brought in February, 1955 is that appellees engaged, between May, 1951 and January, 1953, in carrying out a conspiracy to defraud the Commodity Credit Corporation by making false statements to it whereby it was induced to purchase from Transit Grain Company inferior Canadian wheat under such circumstances as to amount to a conversion under 15 U.S.C.A. 714 m, (a) and (c).

The essence of a prior indictment brought in October, 1953 at Houston, Texas (known as Houston indictment) was formed of precisely the same facts and cause of action.[1] In each indictment count one was the conspiracy count, and in each indictment certain acts done in furtherance of the conspiracy were set forth in additional counts as substantive offenses. There were minor variations between the indictments with respect to the overt acts charged. But each of the three efforts at prosecution had as its base the same alleged criminal course of action over the same period of time.

The Court below found that, by agreement between the parties and with the sanction of the Court, the Houston indictment had been disposed of under such circumstances as to make it clear that punishment was there meted out to cover the entire offense embraced in all of the counts of the indictment and that all parties, including the Court, intended that there should be no further punishment put upon the appellees for the activi-

[1] A third indictment growing out of the same identical facts was brought in New Orleans, Louisiana, but it does not play an important part in this phase of the decision.

ties embraced within that indictment. It is plain that this is true as a matter of fact, but the Government attempts to escape the effect of what was there done because the actors in the Houston drama adopted the expedient of having sentence imposed under two counts of that indictment while dismissing the remaining counts. A consideration of the record of the handling of the Houston case, which was introduced in the Court below without objection, will show that the true facts support the findings of the Court below.

The docket entries of the Houston Division show that the indictment was filed October 5, 1953, that appellees were arraigned October 8, 1953, and pled not guilty to all counts and that the *case was passed to January 4, 1954.* The findings of the Court below disclose that, "Later and before proceeding further, a conference was held between the defendants' counsel and the Government counsel, after which the attorneys appeared in court . . ." The criminal docket next contains an entry dated October 30, 1953, that appellees entered pleas of guilty to counts five and six and that the Government moved to dismiss the remaining counts as to appellees and all counts as to defendant, Transit Grain Company, and that this arrangement was *"Accepted by the Court".*[2] On the same day an order was entered reciting that appellees entered a plea of guilty to counts five and six of the indictment and that the remainder of the counts were dismissed on motion of the United States Attorney. The order recites further that it was entered by the Court after "having heard the plea of the defendant

[2] The emphasis is supplied here and throughout this opinion unless otherwise noted.

and *all questions of fact as well as of law . . .*" The probation officer was directed to make a presentence investigation and the case was passed for sentence until November 11, 1953. The findings of the probation officer do not appear in the record, but the Court below remarked that they "will show very largely what the Court had in mind when he assessed the sentence and if he assessed a sentence that embraced what is now to be presented to this Court".

On November 11th, the Assistant United States Attorney (the same Attorney who had signed the Houston indictment) appeared for the Government and the appellees appeared in person and by counsel, and the Court called upon each attorney for a showing which the Court might consider as the basis for passing sentence. The statements of all of the attorneys dealt with the entire course of dealing embraced in all of the counts of the Houston indictment.[3] The transcript of what transpired in the full hearing before Judge Hannay at Houston shows that these two counts were mentioned only casually a time or two, while all of the attorneys talked in detail of the 1,000,000 bushels described in the conspiracy count and constituting the sum total of all of the wrongdoing embraced in all of the counts. We set forth at this point a portion of the statement of the Assistant United States Attorney to Judge Hannay:

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[3] The plea of guilty was to the fifth and sixth counts; the fifth count charged a false statement by appellees to Commodity Credit Corporation by a writing dated May 22, 1951 covering a single item of 55,000 bushels of wheat; the sixth count charged a false statement by appellees in a writing dated February 28, 1951 covering 15,300 bushels of wheat.

"The time covered in the indictments begins in 1950 . . . Beginning in the year 1950, Transit began purchasing quantities of Canadian Grain. The grain in question was not imported by Transit but was purchased by them after it had come into the United States. They bought, over a period of time there from 1950 and 1951, in excess of 1,000,000 bushels of wheat that had been imported into the United States as exempt from the quota with the notation unfit for human consumption. That doesn't mean that the wheat is actually unfit for human consumption because the tariff requirements in that respect are different from the food and drug requirements. . . . Approximately 1,000,000 bushels of wheat, 650,000 bushels approximately was shipped in bond and in custom bond to the Houston Public Elevator. The balance was shipped to the New Orleans Elevator. . . .

". . . they shipped over 650,000 bushels of Sample Grade Canadian wheat, and in addition shipped other Sample Grade wheat and grain to the total of almost 300,000 bushels during the period from June 1950 to the early part of February, 1952. . . . Commodity Credit Corporation would have paid approximately $79,000.00 more than they should, about that much more than they got the value of in accord with the book entries. . . ."

Every word of that statement referred to the conspiracy count giving the over-all picture of the activities charged against appellees and no part of it referred to the items covered by counts five and six. The Court asked Gov-

ernment counsel a number of questions concerning the total profit which appellees derived from the transactions during the whole period; and questions of income taxes, brokerage fees and the like were fully discussed. The Government attorney's statement also dealt with the extent to which the activities of appellees were morally wrong and was disposed to minimize that feature. The Court heard a number of character witnesses also. The Assistant United States Attorney spoke a number of times during the long discussion, and, towards the last of the hearing, summed up the situation in these words and with this recommendation:

> "I am thinking along here, now, with the Court. I don't believe, in my opinion, that justice would require that *any one of these men at that time of life and with their past record* should be given any time to serve in jail, or the penitentiary, also in view of the fact that they are able to pay a substantial fine. For that reason, my recommendation is that a very substantial fine be imposed as to each of the three defendants and the Court not impose any jail or penitentiary sentence."

At the conclusion of the hearing Judge Hannay levied fines against appellees of $20,000.00 each, including also penitentiary sentences to run concurrently and to be suspended, and the appellees were placed on probation. All of those proceedings were taken in the Houston Division under Judge Hannay on November 11th.

Following the enforcement of those sentences, the Government proceeded to bring an indictment in New

Orleans based upon the same facts and cause of action. The Court there dismissed the conspiracy count for duplicity, whereupon the Government dismissed the remaining counts of the indictment. The Dallas indictment now before us was then brought in February, 1955. In the course of sustaining a motion by appellees to dismiss the indictment, the Court below entered written findings of fact from which a part is here quoted:

> "Our view is that the indictment relates to one transaction, a portion of which was to be consummated in Houston and another portion in New Orleans. . . . We consider the two acts in [as] the same offense and that two prosecutions may not be had therefor.
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> "It is urged that the Government at the Houston prosecution did not dispose of the entire case that there was a plea of guilty to only two counts. It appears, however, from the uncontroverted record and representations of the respective parties to the Court, that when the Houston case was called for trial before Judge Allan Hannay that a plea of not guilty was entered on all counts, but after a conference was held between the defendants' counsel and the Government's attorney that the defendants then came into court and entered a plea of guilty to two counts, Nos. 5 and 6, and that the Government counsel then dismissed all the other counts in the case.
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> "The proceeding has occurred in the courts of our country time without number and during our many years at the bar, engaged much of the time in criminal practice where there were

several cases against a defendant or several counts charged against him in one case and the defendant and the District Attorney entered into open court and the defendant pled guilty to one case or one count and the government dismissed all other counts or cases, *that the parties intended to make a disposition of the entire controversy and that the dismissal was done for the purpose of definitely and finally disposing of the entire case.* And while on the Bench, we have seen the same occur scores of times and *have never had it insisted that the counts dismissed could be again revived.* We do not feel that the government is in position to do so, nor could the defendant.

. . . .

"That has been our understanding in the general practice of law. It has been our uniform practice on the bench and in these forty-five years we have never varied from it or *seen a case where there was an attempt to vary from it.*"

These findings and the statement of counsel upon which they were based reflect beyond doubt that the sentences imposed by the Houston Court were predicated upon the offense charged by that indictment as a whole and not upon the relatively insignificant offenses covered by the fifth and sixth counts. The real right of the thing, so the Court felt, was that, having paid the full penalty once, the appellees should not be called upon in its court to suffer again for the same offense. In so doing, it looked to the language of the judgment itself, but it

looked beyond that language to the facts attending the entry of the judgment. It based its decision upon substance, refusing to be chained absolutely to form. It searched for and found the truth, and felt itself bound by it rather than the mechanics[4] employed in the entry of the judgment. It felt itself beholden chiefly to the spirit which giveth life rather than to the letter which killeth.

This is not to say that the record before the Court below did not furnish ample support for the action under review. It is not possible to read the statements of Court and counsel upon which Judge Hannay acted in entering the Houston judgment without perceiving clearly that the Judge was weighing, with the help of all counsel, the gravity and extent of the entire accusations contained in the Houston indictment; and that the punishment inflicted represented the Court's judgment as to what was proper based upon the whole course of dealings. It is equally clear that the Government counsel, who recommended the disposition which Judge Hannay made of the charges, intended that the punishment meted out should cover the whole of the offense charged in the entire indictment.

The law, too, sanctions the findings of the Court below and the procedures by which they were reached. A

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[4] It is suggested that appellees ought to have made the record of the Houston proceeding letter perfect by permitting all of the counts in the indictment to remain alive, introducing enough proof to satisfy the technical requirements of double jeopardy. This would have introduced an element of sham wholly lacking in the mechanics actually used at Houston which, as found by the Court below, is the universal way of disposing of an entire indictment in that area, even though the plea of guilty relates to a part only of it.

judgment is the product of facts, constituting a merger of the pleadings, the proof, the actions and the findings taken and entered in arriving at it. A judgment is to be construed like other written instruments and the determinative factor is the intention of the Court. As is the case with other writings, if there is doubt about the scope and meaning of the terms used it is proper to admit extrinsic evidence to establish just what was before the Court upon which the judgment was predicated.[5]

Moreover, it is the general rule of interpretation applied to a consent judgment that, "A judgment by consent is to be construed as if the parties had entered into a written contract, duly signed and delivered, embodying therein the terms of the said judgment."[6] From this it follows that universal custom enters into and becomes a part of every consent judgment just as it does every

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[5] 30 Am. Jur., Judgments, Par. 31, p. 834; ib. Par. 284-5, pp. 998-9. In Kelliher et al v. Stone & Webster, Inc., 5 Cir., 1935, 75 F.2d 331, 333, this Court used the following language in outlining the property of considering extrinsic evidence: "'It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment.' De Sollar v. Hanscome, 158 U.S. 216. 'To this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record . . . the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' Russell v. Plate, 94 U.S. 606, 608."

There can be no doubt about the propriety of considering everything which happened in the Houston Court because that was admitted not only without objection, but by stipulation of the parties followed by order of the Court.

[6] 31 Am. Jur., Judgments, Par. 462, p. 107.

contract. "While evidence as to usages and customs is received with caution in all cases, there are well established general rules governing the admissibility of such evidence. When the essential elements or conditions of the existence of a valid usage or custom are shown, such usage or custom is to be given effect as one of the terms of the contract and as binding on the parties as though it were written. The broad general rule is that proof of a valid usage or custom is admissible to annex incidents to a written instrument, to aid in its construction, and to ascertain the intention of the parties in reference to matters about which the contract is silent . . ." 55 Am. Jur., Usages and Customs, Sec. 27, pp. 287-8. And see, to the same effect, *Bilven, et al v. New England Screw Co.*, 64 U.S. 420, 431. There can be no doubt about the establishment of the universal custom here because the Court supplied it out of its own knowledge and it has been nowhere challenged.

Nor are the decisions relied upon by the Government and cited in the majority opinion [7] controlling. They involved efforts to interpose executory and controverted agreements of Government attorneys and the Courts refused to enforce those agreements. But the situation here is quite different. Every step taken in considering and disposing of the Houston indictment was under the watchful eye of the Court and the judgment of sentence was entered only after a full hearing. That judgment was born of and confirmatory of the events and representations leading to it. The judgment stands fully explained, and the intention of the Houston Court appears entirely clear in

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[7] e.g. Bule v. United States, 5 Cir., 76 F.2d 848.

the light of the evidence heard by Judge Hannay and interpreted with the aid of the universal customs and the other factors well known to the Court below.

To fail to uphold the Court below in its findings and judgment is to weaken the judicial process at a vital point. In the federal system the success or failure of the functioning of this process is lodged largely in the hands of the District Judges. They deal with things as they are, with situations according to the real truth of them. They have conferences without number by calling counsel to the bench during trial, and they confer likewise in their chambers with attorneys for the respective litigants. The tendency of procedural rules [8] is towards utilizing conferences between court and counsel to shorten trials and approach more speedily and easily to the ends of justice. It is inevitable that a multitude of things happen in the course of such handling which do not find their way onto the printed page for our use.

This gives the trial judge a "feel" and insight and appreciation which an appellate court cannot hope to approach. As indicated by the Court below, a very large percentage of cases, civil and criminal, are disposed of by procedures similar to those unfolded by this record. It would not be possible for the courts to function efficiently unless the vast majority of cases could be disposed of without trial. It is absolutely necessary to place wide discretion and trust in such matters in the District Judges if the system is to succeed. It ill becomes us, in our cloistered isolation, to look with too critical an eye upon

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[8] See e.g. Rule 16 F.R.C.P.

these functionings of the judicial process so essential to the administration of justice.

The cause of justice will be set back immeasureably if those representing, for the time being, this ponderous organism which is our government are to be repudiated and their actions nullified by the accident of change of personnel[9] goaded by the importunities of overzealous federal functionaries who are apparently unwilling to accept the judgment, as to extent of punishment, when it is pronounced by those clothed with that responsibility.

This record sustains the action of the Court below. What it was attempting was to make the Government do right, just as individuals must do. I am impelled to approve and applaud such action. Therefore, I dissent.

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[9] In its findings the Court below stated: "The government apparently feels that penalties assessed by Judge Hannay were inadequate . . ." This thought is buttressed by the fact that the new prosecutions were not brought at Houston, where all of the facts are known, but at other points in an effort apparently to find a climate more favorable to the Government's views.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION.

No. 13,829-CRIMINAL.

UNITED STATES OF AMERICA,

versus

LEO POTISHMAN, JULIAN SCOTT, TRANSIT GRAIN COMPANY and CHARLES J. WINTERS.

OPINION OF THE COURT.

In the above styled cause we have under consideration a motion to dismiss which involves among other grounds a plea of former jeopardy.

We have three indictments either growing out of one transaction or one series of transactions pertaining to the same subject matter. The indictment before us was found and placed at Dallas in the Northern District of Texas. A previous indictment, involving the same parties in the main, was filed and tried at Houston, and later a similar indictment to the one before us was presented in the Eastern District of Louisiana at New Orleans and Count 1 held to be duplicitous by the trial judge in that court.

According to the various indictments and motions before us, the defendants Leo Potishman, Julian Scott, and the Transit Grain Company of Fort Worth, Texas, purchased large quantities of low grade wheat which was imported into the country from Canada. It appears that a portion of this wheat was transported to the grain elevators at Houston, Texas, and a portion to New Orleans, Louisiana. In New Orleans, the operator of the grain elevator was Charles J. Winters, who has been made a party to this indictment. In Houston, the operator of the elevator at that point was William Fellrath, so that Fellrath is a defendant in the Houston indictment along with the defendants now before us in this court, and Winters is a defendant in the New Orleans and Dallas indictments.

The government charges in its indictments that the defendants Transit Grain Company, Potishman and Scott entered into a conspiracy to have this cheap wheat mixed and comingled in the elevators at its destination at Houston and New Orleans, that it would be mixed and mingled with higher grade wheat belonging to the Commodity Credit Corporation and thereby the lower grade wheat, being mixed and mingled, resulted in defrauding the Commodity Credit Corporation by lowering the grade of the wheat which the Commodity Credit Corporation owned and which was mixed with the lower grade wheat, that in order to effect this mixing and comingling of low grade wheat owned by the defendants with the better wheat owned by the Commodity Credit Corporation false statements were made by which the Commodity Credit Corporation was defrauded, relying upon the truthfulness of such statements.

The government brings the Houston indictment to cover the wheat that was stored in the Houston warehouse and the New Orleans indictment to cover the wheat that was stored in the New Orleans warehouse. The Dallas indictment is a refiling in substance of the New Orleans indictment.

FORMER JEOPARDY.

The indictment at Houston came on for trial before Judge Hannay, District Judge, on November 11, 1953, at which time the defendants entered a plea of not guilty. Later and before proceeding further, a conference was held between the defendants' counsel and government's counsel after which the attorneys appeared in court and the government dismissed all counts in the indictment except No. 5 and No. 6. The defendants entered pleas of guilty to those two counts and were fined each $20,000.00 and a term in prison which was probated.

Then the New Orleans case was filed and presented and after Count 1 had been dismissed, the entire case, in substance, was filed in Dallas in the Northern District of Texas and is now before us for consideration under the motions in question.

Splitting one transaction into several charges represented by different indictments and prosecutions is not favored by our laws. The doctrine of *autrefois acquit* and *autrefois convict* was a part of the jurisprudence before the constitutional provision was ever drafted, which re-

stated the law to the effect that no man should twice be put in jeopardy for the same offense.

Certain jurists express themselves in a language that peculiarly appeals to us. We have in mind, for instance, Judge Learned Hand, reared in the Adirondack Mountains, but was long the Chief Judge of the Second Circuit, and also particularly Judge John J. Parker, Chief Judge of the Fourth Circuit, from North Carolina.

We have before us a decision by Judge Parker, a case so nearly parallel to the one before us that we are inclined to adopt a considerable section of Judge Parker's opinion and the reasoning therein contained, so much of it being in point in the present controversy. The facts in the two cases are parallel, one of them being damaged wheat and the other moonshine whiskey.

In eastern North Carolina and southeastern Virginia a group of illegal distillories were in operation. The government elected to bring a prosecution in the Eastern District of North Carolina and later to bring one in the Eastern District of Virginia. The time in which the conspiracy was alleged as having taken place in each District or state overlapped. Therefore the conspiracy was running at the same time in the manufacture of this illicit whiskey. Two of the defendants that were tried in the North Carolina case were again tried in the Virginia case and urged their plea of former jeopardy. *Short et al. v. United States*, 91 Fed. 2nd 614.

* * *

"The fourth point, i.e., the question of prior jeopardy relied upon by the defendants Nebbs and Fentress, arises as follows:—

"Defendant Nebbs had pleaded guilty in the Eastern District of North Carolina to an indictment charging conspiracy to distill, sell, remove and conceal spirits without paying the internal revenue taxes or complying with the other provisions of the internal revenue laws.—(such) conspiracy—was alleged to have existed for three years prior to the finding of the indictment in June, 1935, or for a period of eighteen months of the time covered by the indictment in this case (the Virginia case).—The defendants were charged with conspiracy in the Eastern District of North Carolina—.

* * *

"The defendants Nebbs and Fentress filed pleas of former jeopardy setting up the North Carolina indictment and the proceedings had thereunder—.

* * *

" 'The plea of autrefois acquit,' says Mr. Justice McLean in United States v. Shoemaker, Fed. Cas. No. 16,279, 'consists of matter or record, and matter of fact. Of record, the indictment and acquittal of fact, that the defendant is the same person, and that the offense is the same.'—In either case, where the record offered shows on its face the identity or nonidentity of person and offense, the question is one of law for the court—

—"it is to be noted that all charge continuing conspiracies and that the indictment in the case at bar covers a portion of each of the periods covered by the North Carolina indictments. It is well settled that where a continuing offense such as conspiracy is charged as having been committed within a stated period, an acquittal or conviction will bar another

prosecution for the same offense alleged to have been committed within a period which overlaps any part of the former period.—

"And the fact that the indictment in the case at bar charges that the defendants conspired in the Eastern District of Virginia, whereas the North Carolina indictments charge the conspiring in the Eastern District of that state, does not show necessarily that the crimes charged are not the same.—

> " 'If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and that may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement.—'

"Nor are the charges shown to be different because the indictment before us specifically names a number of persons not named as defendants in the North Carolina indictments and those indictments specifically name persons not named in the indictment here.—

—"to hold that a difference in the overt acts charged in the indictments constitutes a difference in the charge of crime would permit the prosecution of the same conspiracy as many times as there are acts done in furtherance of it. This cannot be the law.—

* * *

—"When a conspiracy has been once prosecuted, therefore, the rule against double jeopardy forbids that it be prosecuted again under an indictment which

merely adds allegations as to its objects, as—violation of an additional statute—.

• • •

—"The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test which is a practical, not a theoretical one.—

—"Blanket charges of 'continuing' conspiracy with named defendants and 'other persons to the grand jurors unknown' fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties.—(the) result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed—." *Short et al. v. United States*, supra

Our view is that the indictment relates to one transaction, a portion of which was to be consummated in Houston and another portion in New Orleans, and the government may not divide this into two separate cases because some of the wheat was stored at one place and some at another.

We take the following statement from the written argument of government counsel which explains the manner in which these prosecutions have been conducted:

"As orally stated to your Honor at the time of the hearing, the Criminal Division of the Department of Justice at Washington had directed the United States Attorneys for the Eastern District of Louisiana and the Southern District of Texas that there were two

separate offenses, and that the indictment returned in Houston against the defendants, Transit Grain Company, Potishman, Scott and Fellrath, was not intended to cover offenses committed by the defendants, Transit Grain Company, Potishman and Scott in Louisiana or elsewhere.—"

We think learned counsel is in error in this respect. In civil proceedings a suit might be maintained in New Orleans joining Mr. Winters, the operator of the elevator, and another civil proceeding in Houston, the Southern District of Texas, but the government may not twice prosecute the defendants because the wheat was stored in two places.

In the *Short* case, *supra*, from which we have quoted liberally:

—"The evidence leaves no room for legitimate discussion. It conclusively establishes but one conspiracy. There was no separate conspiracy— and no evidence tending to show such separate combination. The Fifth Amendment—protects all against double punishment for the same offense. Its enforcement and its application demand a test which is—not a theoretical one.—" (p. 623)

We might here note the sameness of the matters set out in the present indictment as compared with the one in the Houston indictment:

Parties at Dallas: Leo Potishman, Julian Scott, Charles Winters, and Transit Grain Company
Houston parties: Leo Potishman, Julian Scott, Transit Grain Company, and William Fellrath

The Dallas indictment charges conspiracy. The Houston indictment charges conspiracy.

The Dallas indictment alleges an attempt to defraud the United States and Commodity Credit Corporation. The Houston indictment charges the same.

The Dallas indictment calls for Title 15, 714m of the U. S. Code. The Houston indictment calls for Title 18, Section 371 and Title 15, 714.

The Dallas indictment charges false statements to the Commodity Credit Corporation. The Houston indictment charges the same.

The Dallas indictment charges that it was to influence the Commodity Credit Corporation that the false statements were made. The Houston indictment charges the same.

The Dallas indictment sets forth again Title 15, Sec. 714 a. The Houston indictment sets forth the same.

The Dallas indictment as to time says the conspiracy extended from May 31, 1951 to January 15, 1953. The Houston indictment says it extended from November 1, 1950 to March 31, 1953, each indictment covering a large portion of the same period.

The Dallas indictment charges that the wrong consisted in part of mixing at New Orleans inferior wheat with a better grade of wheat. The same is charged in the Houston indictment.

The Dallas indictment says that false entries were made in the books and records. The Houston indictment charges the same.

The Dallas indictment says that it was designed to defraud the Commodity Credit Corporation. The Houston indictment says the same.

Our view is that the government was doing exactly what its counsel says it started out to do; namely, to prosecute at Houston for the wheat that was delivered to the elevator or that was delivered at that point, and to prosecute at New Orleans or later at Dallas all the wheat that was delivered at New Orleans. We consider the two acts in the same offense and that two prosecutions may not be had therefore.

It is urged that the government at the Houston prosecution did not dispose of the entire case and that there was a plea of guilty to only two counts. It appears, however, from the uncontroverted record and representations of the respective parties to the Court, that when the Houston case was called for trial before Judge Allan Hannay that a plea of not guilty was entered on all counts, but after a conference was held between the defendants' counsel and the government's attorney that the defendants then came into court and entered a plea of guilty to two counts, Nos. 5 and 6, and that the government counsel then dismissed all the other counts in the case.

The proceeding has occurred in the courts of our country time without number and during our many years at

the bar, engaged much of the time in criminal practice where there were several cases against a defendant or several counts charged against him in one case and the defendant and the District Attorney entered into open court and the defendant plead guilty to one case or one count and the government dismissed all other counts or cases, that the parties intended to make a disposition of the entire controversy and that the dismissal was done for the purpose of definitely and finally disposing of the entire case. And while on the Bench, we have seen the same occur scores of times and have never had it insisted that the counts dismissed could be again revived. We do not feel that the government is in position to do so, nor could the defendant.

The Dallas indictment is almost a copy or a restatement of the one filed at New Orleans, the first count in each indictment being the conspiracy count.

Before Judge Skelly Wright of the Eastern District of Louisiana at New Orleans on June 2, 1954, Docket No. 24,128, the New Orleans case was presented on motion and Judge Wright dismissed Count No. 1 as being duplicitous, which is also the conspiracy count in the Dallas indictment. Perhaps one trial judge is not bound by the preliminary orders of another, but certainly his action is always persuasive and we think in this instance that it was correct. And we concur in Judge Wright's opinion as to the duplicity of this count.

The government apparently feels that penalties assessed by Judge Hannay were inadequate, especially since they

were holding another suit in reserve to be presented at New Orleans or at Dallas.

We might note here that a civil action is not barred by a plea of former jeopardy and it would seem that the defendants in this case are abundantly solvent and that the road would be open to the government to recover any monetary losses that it has sustained in a civil suit.

Our Constitution in its Fifth Amendment declares "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

When a defendant is put to trial a second time, he is twice in jeopardy. In some instances it might take a trial and a production of all the facts to determine that it was a case of second jeopardy. For instance, if the defendant, we would say, burglarized the same house twice, he could be prosecuted for the second burglary if it took place subsequent to his first conviction, but it might take evidence to show that there were two burglaries and not one.

However, where the indictment is clear, as was held by Judge Parker, there is no jury question and the Court should as a matter of law terminate the second prosecution.

(Sgd.) T. WHITFIELD DAVIDSON,

.....

United States District Judge.

JUDGMENT.

Extract from the Minutes of February 23, 1956.

No. 15,533.

UNITED STATES OF AMERICA,
versus
LEO POTISHMAN, JULIAN SCOTT, TRANSIT GRAIN COMPANY and CHARLES J. WINTERS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

"Cameron, Circuit Judge, dissenting."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 778

LEO POTISHMAN, JULIAN SCOTT, TRANSIT GRAIN COMPANY AND CHARLES J. WINTERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 196–214; Pet. 19–37) are not yet reported. The opinion of the District Court (Pet. 38–49) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1956 (R. 196, 215, Pet. 19, 50). The petition for a writ of certiorari was filed on March 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

An indictment returned in Houston, Texas, charged petitioners, except Winters, with a conspiracy involwing the illegal handling of grain at the Houston elevator and with various substantive offemses. Two individual petitioners pleaded guilty to two substantive offenses, and the remaining counts, including the conspiracy count, were dismissed. The instant indictment charges a comspiracy involving the illegal handling of graim at the New Orleans elevator and various substantive offenses in connection therewith.

The questiom presented is whether the instant indictment should have been dismissed on the basis of petittioners' allegation, without supporting proof, that there had been an agreement with the United States attorney at Houston that the pleas of guilty by two petitioners to two substantive offenses there charged would be a final dispositiom of all matters relating to petitioners' illegal activities in handling grain.

STATUTE INVOLVED

Section 15 of the Act of June 29, 1948 (62 Stat. 1074; 15 U. S. C. 714m) provides in relevant part:

> (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Corporation, or for the purpose of ob-

taining for himself or another, money, property, or anything of value, under this Act, or under any other Act applicable to the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

* * * * *

(c) Whoever shall willfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

(d) Whoever conspires with another to accomplish any of the acts made unlawful by the preceding provisions of this section shall, upon conviction thereof, be subject to the same fine or imprisonment, or both, as is applicable in the case of conviction for doing such unlawful acts.

STATEMENT

A four-count indictment returned in February 1955 in the United States District Court for the Northern District of Texas, Dallas Division, charged the Transit Grain Company, a Texas corporation, Leo Potishman, its president, Julian Scott, its vice-president, and one Charles J. Winters, the superintendent of the New Orleans, Louisiana, Public Grain Elevator, with violations

of the Commodity Credit Corporation Charter Act (R. 44–64). Count 1 charged petitioners with a conspiracy under 15 U. S. C. 714m (d) to violate the provisions of 15 U. S. C. 714m (a) by making false statements for the purposes of influencing the action of the Commodity Credit Corporation and obtaining money, and of 15 U. S. C. 714m (c), by converting to the use of Transit quantities of wheat owned by the Corporation (CCC) (R. 44–58). The conspiracy was described as a plan whereby Transit would purchase large quantities of damaged Canadian wheat, ship them to the New Orleans elevator where they would be blended with and substituted for a higher grade of American wheat owned by the CCC; and by this means, and through various false statements and entries (facilitated by paying the elevator superintendent for his part in the fraudulent operation), petitioners would sell the damaged wheat to the CCC in purported fulfillment of contracts for the delivery of a higher grade of wheat (R. 47–49). Among the overt acts alleged were purchases of Canadian wheat on various dates from June 5, 1951, to July 16, 1951, and the receipt of such shipments at the New Orleans elevator (R. 50–54).

The remaining three counts charged substantive violations of 15 U. S. C. 714m (a): Count 2 alleged that petitioners falsely stated to the CCC on October 5, 1951, that Transit had wheat en route to the New Orleans elevator and would be

able to deliver 62,769 bushels of the desired grade (R. 58–60); Counts 3 and 4 alleged false statements made on September 26, 1951, and October 10, 1951, respectively, that 67,897 bushels (worth $171,100.86) and 62,709 bushels ($158,027.94) of wheat of the desired grade had been transferred in the New Orleans elevator from the account of Transit to that of the CCC (R. 60–64).

The district court dismissed all counts as to all petitioners on grounds of former jeopardy in view of criminal proceedings previously had in the federal courts at Houston against some of the petitioners and at New Orleans against all of them (R. 90–103, Pet. 38–49).

These prior proceedings were as follows:

Houston proceedings: In October 1953, a ten-count indictment was returned in the United States District Court for the Southern District of Texas, Houston Division, against Transit, its president (Potishman) and vice-president (Scott), and one William Fellrath, Superintendent of the Houston Public Grain Elevator (R. 3–25). Count 1 alleged a conspiracy to commit various offenses, including offenses under 15 U. S. C. 714m (a) (R. 4). The conspiracy was described (R. 3–13) as one operating (within the Houston elevator and with the aid of its superintendent) similarly to that now charged in the instant indictment (with respect to the New Orleans elevator), but different overt acts charg-

ing grain purchases and receipts, record entries and reports were alleged.[1]

Counts 2 through 6[2] charged substantive offenses in violation of 18 U. S. C. 714m (a) in that defendants, for the purposes of influencing the action of the CCC and obtaining money, made false statements that varying quantities of grain of specified grade had been transferred in the Houston elevator from Transit's account to that of the CCC (R. 13–19).

Upon arraignment on October 8, 1953, each of the defendants entered a plea of not guilty (S. R. 8,[3] Pet. 4). On October 30, 1953, Potishman, Scott, and Fellrath were rearraigned and entered pleas of guilty to counts 5 and 6 (R. 64–65, S. R. 9), counts which specifically charged false statements made on May 22, 1951, with respect to 55,000 bushels of wheat (R. 17–18) and on February 28, 1951, with respect to 15,300 bushels (R. 18–19). On the same day, on motion of the Government, the other counts were dismissed as to the individual defendants and the entire indictment dismissed as to the company (S. R. 9). After a hearing on sentencing on November 11,

[1] The record shows only one overt act (the allegation of a purchase) which might be common to both indictments (see R. 8 (paragraph 6) and R. 53 (paragraph 12)).

[2] The remaining four counts, involving the same transactions as the other substantive counts, charged petitioners with using the mails in a scheme to defraud in violation of 18 U. S. C. 1341.

[3] Supplemental Transcript attached at p. 181 of the Record.

1953 (R. 120–170), the individual defendants were each fined $20,000, sentenced to three years imprisonment with sentence suspended, and placed on probation for five years (R. 165, S. R. 9–10).

New Orleans proceedings: In March 1954, a four-count indictment was returned in the United States District Court for the Eastern Division of Louisiana, New Orleans Division, against Transit and its officers and Winters, superintendent of the New Orleans grain elevator (R. 26–44). With minor variations, it was basically the same as the present indictment for it was plainly drawn to charge the same offenses. Unlike the present indictment, however, the conspiracy count alleged both a conspiracy to defraud the CCC and the United States and a conspiracy to violate 15 U. S. C. 714m (a) and (c) (R. 28). For this reason, the court found the conspiracy count duplicitous (R. 72). Thereafter the government, with leave of the court, entered a *nolle prosequi* of the entire indictment (R. 73) and the defendants, now petitioners, were re-indicted in the present proceeding in Texas.[4]

In dismissing the instant indictment on grounds of double jeopardy, the district judge stated that he had learned from experience during his many years on the bench that whenever there was a guilty plea to one case or count, and the government dismissed all other counts or cases, the

[4] The New Orleans proceeding has no significance to petitioners' present argument.

parties intended to make a disposition of the entire controversy and that the dismissal was done for the purpose of definitely and finally disposing of the entire case (R. 101, Pet. 47–48). He placed upon the government the burden of proving affirmatively that the Houston dismissal was an exception to this "rule of thumb."[5] He dismissed the indictment, not only as directed against the two defendants who had pleaded guilty to the substantive counts, but also as it applied to the corporation (as to which all counts had been dismissed in Houston) and Winters, a New Orleans elevator superintendent who had not even been named in the Houston indictment (R. 103).

The Court of Appeals reversed, one judge dissenting (Pet. 50). The majority held there was no foundation for the claim of jeopardy since

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[5] At a hearing on motion to dismiss the present indictment on December 13, 1954, the judge said (R. 178, 179–180):

"First, the government is bound by what took place, unless there was an agreement, that it can be shown that there was agreement between the District Attorney and defendant's counsel to accept the plea of guilty on certain counts and leave the others open to formal prosecution or jurisdiction. Unless there is proof offered that there was such an arrangement made, we think the plea of former jeopardy must be sustained. There is no requirement of proof in our practice, but there must be proof of an exception to it.

* * * * * * *

"If there is no evidence from the former counsel, or the Judge, that this was an exception to the general practice, we think that the plea of former jeopardy must follow in the light of the two indictments and the judgment, if, unless it be that it is a separate transaction."

the offenses to which two petitioners pleaded guilty in Houston were not the same as the offenses charged in the instant indictment (R. 21–22), and that there was nothing in the record to justify an estoppel against the government by reason of what had occurred in the Houston proceedings (R. 23).

ARGUMENT

Petitioners contend (Pet. 10–14) that the District Court properly dismissed the instant indictment (relating to activities at the New Orleans elevator) on the basis of an alleged agreement between them and government counsel at Houston (under an indictment relating to activities at the Houston elevator) that pleas of guilty entered by two officers to two substantive offenses at Houston would completely and finally dispose of all matters relating to petitioners' illegal activities in handling grain. They have apparently abandoned the contention that the instant indictment would place them in double jeopardy and rely instead upon a claim of estoppel.

As the majority below pointed out, there is in this record no proof of the agreement alleged to constitute an estoppel. There is nothing in the present record which would support the view that there was any agreement relating to activities at the New Orleans elevator. At the hearing on sentencing in Houston, at the time the two pleas of guilty were accepted, the United

States attorney did state that Transit had purchased about 1,000,000 bushels of poor grade Canadian wheat, of which 650,000 bushels had been stored in Houston and the balance in New Orleans (R. 121–122), but the discussion thereafter related to the Houston transactions. The only figure the United States attorney was willing to be definite about was the overpayment by the Commodity Credit Corporation on the transactions alleged in the indictment (R. 122–125). Much of the discussion related to payments by Transit officers to Mr. Fellrath, the superintendent of the Houston elevator, who obviously would not be involved in New Orleans (R. 128–144). The Court of Appeals therefore properly ruled that "in the present state of the record, it cannot be held that the Government is estopped by anything that occurred in the Houston proceedings" (Pet. 23).

Moreover, even if counsel for the government had made the alleged agreement, it would not be binding in the present circumstances. At least without the concurrence of the Department of Justice, a United States attorney could not thus dispose of offenses in another district, not charged in the indictment before him. Cf. *Whiskey Cases,* 99 U. S. 594; *Buie* v. *United States,* 76 F. 2d 848, 849 (C. A. 5), certiorari denied, 296 U. S. 585; see also *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20 (C. A. D. C.), certiorari denied, 317 U. S. 658. And it is clear that

a defendant may be reindicted for an offense for which he has not been placed in jeopardy, and that a *nolle prosequi* does not constitute a valid basis for a claim of jeopardy. *Dortch* v. *United States,* 203 F. 2d 709, 710 (C. A. 6); *United States* v. *Fox,* 130 F. 2d 56 (C. A. 3), certiorari denied, 317 U. S. 666.

Interwoven in petitioners' argument is a suggestion of *res judicata* based upon the proposition that all of the illegal activities charged in the indictments constitute a single overall conspiracy. However, even if this proposition were true, it is of no import for, as we have pointed out above, the conspiracy count of the Houston indictment, having been dismissed, it was not finally disposed of by the Houston proceedings.[6] The two counts disposed of were substantive in nature. It hardly needs elaboration that these two counts do not involve the same offenses as the three substantive counts of the instant Dallas indictment; they charge different false statements on different days as to different amounts of wheat in a different elevator. See *Blockburger* v. *United States,* 284 U. S. 299; *In re Henry,* 123 U. S. 372, 374; *Berg* v. *United States,* 176 F. 2d 122, 125–126

[6] Since there was no jeopardy on the Houston conspiracy count, there is no basis for petitioners reliance on *Short* v. *United States*, 91 F. 2d 614 (C. A. 4) (Pet. 10, 14) which held that separate parts of one overall conspiracy involved only one offense so that jeopardy as to part of the conspiracy in one district barred prosecution for another part in another district.

(C. A. 9), certiorari denied, 338 U. S. 876. It is likewise clear that a plea of guilty to making the two false statements would not preclude prosecution for a conspiracy to make these and other false statements and to convert property. See *Sealfon* v. *United States,* 332 U. S. 575. The error of alleging otherwise is most clearly apparent in relation to the company, against which all counts were dismissed in the Houston proceeding, and in relation to Winters, who was not even named in the Houston indictment.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1956.

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